Commentary on the Oil & Gas Sector Discussion Paper IHRB/SHIFT

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Dear IHRB/SHIFT,

I would like to thank you for the opportunity to comment on your O&G sector discussion paper. I would further like to wish you all the best with your important work on the development of further human rights guidance.

In response to the following questions in particular:

- *Does the Discussion Paper identify the most serious and the most likely impacts that companies in this sector may have on human rights?*
- *Does the Discussion Paper identify the major challenges that companies in this sector are facing in respecting human rights?*
- *Are there good practices in addressing these human rights challenges that could be built on in developing the forthcoming guidance on the corporate responsibility to respect in this sector?*
- *What form should the forthcoming guidance take in order to add greatest value in advancing respect for human rights in this sector?*

I would like to present the following commentary.

General comment 1 – stakeholders to whom the guidance should be directed: States

Par. 6.1 states that there was general agreement among stakeholders that the guidance should target states as well. Although understanding that the guidance is to build on the UN Guiding Principles, and not rewrite them, and understanding the political/ strategic reasons for probably not wishing to enter into this discussion again, I will, since state related guidance was proposed, take the opportunity nonetheless to stress that guidance to states should involve a call from IHRB/SHIFT on states/the EU to prevent free-riding and complete voluntarism, by not just stimulating company respect for human rights and company performance of human rights due diligence, but by requiring it through regulation (much as financial due diligence is required in certain financial activities, see e.g, the Prospectus Directive, and new article 122a of the EU Capital Requirement Directive).

We only have to look at recent examples to see that, four years after the publication of his protect, respect and remedy framework and a year after adoption of his Guiding Principles, Ruggie's framework has not yet fundamentally changed negative behavior of even its staunchest advocates - although it was not designed to do so in any absolute sense as a 'soft law' instrument, but the examples of those who still misbehave today signify the importance of EU, level playing field creating regulation.

Perhaps further guidance to states, with regard to *remedy*, should involve recommendations and concrete guidance regarding access to justice for victims, in particular by improving *equality of arms* through procedural law (e.g. creating the possibility of class action suits in civil law countries, better access to evidence, etc.) and perhaps financial legal support systems.

Comment 2 - most serious issues and major challenges

In my opinion this paper sets out most issues and challenges, however, additional rights and issues could/should be added.

In line with the general recommendations under **par. 6.1** to be practical, uncomplicated and use definitions of human rights as they appear in key human rights instruments, I would make the following comments regarding para. 3.1 – 3.8

Ad 3.1 - Impacts on right to property and standard of living

Although rights to property are very much established in the context of municipal law, they are less so in the context of international (UN) human rights law as a positive right. The right to property is not explicitly formulated as such in the international UN human rights treaties, especially not in the two main instruments the ICCPR en ICESCR (although they are mentioned in relation to discrimination in CERD and CEDAW). The right to property does appear in the European Convention on Human Rights, Protocol I (art. 1), the American Convention on Human Rights (art. 21), and the African Charter on Human and People's Rights (art. 14).

Forced eviction and relocation are, more accurately, connected to the right to adequate housing in particular, as an element of the right to an adequate standard of living (e.g. see CESCR General Comment 7 (1997) en Commission on Human Rights Resolution 2004/28).

Companies could use the guidance of the UN Basic Principles and Guidelines on Development-Based Evictions and Displacement in this matter.

Ad 3.2 FPIC

'The nature and application of the right to FPIC remains contested. ***At a minimum this applies to indigenous people****'…*

I assume 'this' refers to the right to FPIC, not to the fact that it is contested. This second sentence could, if so entered in the guidance, in my opinion, cause confusion among non-legal company personnel. I would therefore specify on the basis of the following facts: As such FPIC is not formulated as a separate right in the key UN human rights treaties, however, several treaty bodies, e.g. the Human Rights Committee (General Comment 23), and most notably the Committee on Economic, Social and Cultural Rights (General Comment 21) and the Committee on the Elimination of Racial Discrimination (General Comment 23) have interpreted cultural rights and non-discrimination rights to contain an obligation to prior consult and consent. ILO Conventions 107 and 169 refer to free consent by indigenous people and argue that consultation and participation are key. Moreover, the UNDRIP, although a non-binding declaration, formulates FPIC as a right of indigenous people. UNDRIP has gathered force as a (soft law) standard through recognition as a standard by human rights bodies, the inter-American human rights system, and court. Furthermore, the new IFC Sustainability Standards require its clients, in Performance Standard 7, to obtain FPIC from indigenous people that could be affected by their projects. [1]

[1] See also: Amnesty International, 'Time to invest in human rights', Sept. 2010, par. 7.4, http://www.amnesty.org/en/library/info/IOR80/004/2010/en

'*It is typically seen as the primary duties of governments to conduct such consultations' … it is (also) widely viewed as a responsibility of the O&G companies [..] where government has not done so'*

This raised the question with me as to who 'sees this typically' and to whom 'widely' refers? It could not be the position of the UN(Human Rights Council) and Ruggie (or the OECD), since the Guiding Principles clearly state that part of corporate due diligence is to assess and evaluate, independently, human rights concerns (in addition to governments' own, primary, human rights obligations in Pillar I). Ruggie's guidance does explicitly not propose that corporate due diligence action should only be taken when governments fail to do so. GP18 even states: "To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them ***directly*** [*emphasis added]* in a manner that takes into account language and other potential barriers to effective engagement .

Ad 3.3 impacts on right to freedom of movement and cultural rights

…

Ad 3.4 impacts on the rights to health, clean water and food

More accurately the impacts are on the right to (the highest standard of physical and mental) health and an adequate standard of living (this includes food and water).

Important as well: pollution impacts or can impact the **right to gain a living through work** (when polluted waters or lands make such work impossible and no alternative is provided).

Pollution of air can also occur: e.g. through constant gasoline fumes in the air, affecting lungs and breathing, through gas flaring which possibly creates droplets of non-combusted oil particles and acid rain. The impact of gas flaring appears in general to have not yet been sufficiently studied, but indications are that it has damaging effects on environment and human/animal health (corporate due diligence would, in light of available indications, exactly be to commission such comprehensive study).

Ad 3.5 impacts on the rights to life, security of person and freedom from torture and inhuman, degrading treatment

I would add here the rights to freedom of opinion, expression and assembly (art. 19 and 21 ICCPR). Authorities might disallow expression of these rights and companies might be seen as or even be complicit in frustration of these rights.

Ad 3.6 impacts on labor rights

What about the right to just and favorable conditions of work (ESCR, art 7)? Wages, safe and healthy conditions etc.? These are not mentioned in this paragraph.

Ad 3.7 Impacts on the right to freedom of expression

I would more completely refer here also to the rights to opinion, expression and assembly (art. 19 and 21 ICCPR). People might not only lack information, but might be hindered in their rights to voice their opinion and to assemble to gain that information, needed to express themselves on the issues at hand.

Ad. 3.8 Impacts on the rights of vulnerable groups

…

Additional issues that should be mentioned

The human right to effective remedy
Not listed here, but crucially important. Remedy is mentioned under par. 5.7, but only as a 'guiding principle'. This ignores the fact that effective remedy is not a mere 'principle', but a hard human right (see ICCPR, article 2.3 and Human Rights Committee General Comment 31 (2004)).

The guidance for companies would then be to put effective grievance mechanisms in place, in line with this right and to not frustrate the right of victims to use state judicial mechanisms. We can find in the Chevron vs Ecuador case arguments to propose that Chevron in fact did its best to frustrate this right – most clearly indicated when looking at the fact that even when an Ecuadorian judge ruled in favor of the Ecuadorians, Chevron used a BIT agreement to prevent actual payments of damage award to the victims, and even went to far as to report the plaintiffs lawyers to the police accusing them of criminal RICO activity, an act that could potentially scare off lawyers to represent future victims. You could find further arguments in the Trafigura cases in the UK and Holland, in the context of which claims were made that evidence was found that Trafigura bought off witnesses and avoided accountability (and so remedy to victims) in Ivory Coast by paying off officials.

Regarding the industry's stated challenge to figure out who is responsible for dealing with grievances, when responsibility is shared with other business partners, I would suggest:

1) Whenever the company shares responsibility for a grievance, it should, at least out of moral responsibility, pro-actively take up its share and do what it can (and never use multiple responsibility as an argument to not undertake action and shift the responsibility to act to one of its partners);
2) At a minimum, a company should take a rights and liability based approach: if a company finds through legal analysis of an incident of rights violation that it could be legally liable, it should conclude that its operations and behavior are in such close proximity to the legal transgressions that it has to act (by either mitigation or by provision of remedy, and whether responsibility for the act be shared or not).

Bribery and corruption as issue of corporate behavior
Bribery and corruption are not only host state governance issues, but also corporate behavioral issues. As IPIECA has stated in its toolkit for the industry; bribery and corruption can lead to human rights abuses, when "it leads to diversion of resource revenues from broad societal needs", and companies should avoid complicity in this.[2]

Concerning par. 4.1, bullet point 1 (in combination with par. 5.4. bullet point 3); Contracts
Not only are there human rights risks emanating from the host state side in negotiating investment contracts, there are risk emanating from the corporate side as well, i.e. the entering of ***stabilization clauses in BIT contracts or PSAs*** **(**or perhaps other oil contract types) leaving companies an option to stop human rights protective action by authorities through amending and improving existing laws. A company could successfully protest such changes on the basis of 'freezing current law' clauses, which, on penalty of severe damages, prevent these legal change actions when they negatively affect investments and thus are contrary to the BIT/PSA contract stipulations.

See e.g. the study 'Stabilization Clauses and Human Rights, A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights', March 11, 2008: *"This study found that stabilization clauses are sometimes drafted so as to insulate*

[2] See IPIECA:
http://www.total.com/MEDIAS/MEDIAS_INFOS/3467/FR/Human_Rights_Training_Toolkit_for_the_Oil_&_Gas_Industry.pdf

investors from having to implement new environmental and social laws, or to provide investors with an opportunity to be compensated for compliance with such laws (p. v)... Concerns about stabilization clauses and human rights arose in earnest in 2003 when the oil company BP published its private investment contracts relating to a major cross-border pipeline project. Subsequently, some civil society groups criticized BP for various aspects of the contracts, including the stabilization clauses. These groups claimed that the clauses—by exempting an investment project from new laws aimed at protecting human rights, or by requiring host states to compensate the investor financially for compliance (p. vii-viii)... In this study, 83 percent of full freezing clauses are in the extractive sector "

A UNDP discussion paper even calls stabilisation clauses "modern day contractual colonialism".[3]

Also the set-up by companies of special purpose subsidiaries that become party to the contract but lack the financial means to stand behind commitments regarding environment and human rights might be a concern.

(Par. 6.2, bullet point 3), **objectives to; integrate of human rights provisions in contracts with governments** should thus, vice versa, recognize that certain contract provisions can serve companies to actually frustrate human rights protection and therefore a linked objective should be here that provisions in contracts should not be so formulated as to create a strong incentive or a way to prevent positive government action regarding human rights.

Par. 5.5, bullet point 3: concerns for legal liability and law suits
This is an important issue. It is exactly this concern that the public and civil society sees as leading companies often to 'avoidance' behavior rather than 'dealing with the problem' behavior. I would recommend that a rights-based approach to human rights concerns and human rights due diligence in the O&G sector will help *avoid* company liability and law suits, if it acts due diligently to prevent and mitigate and/or remediate the problems found. Performing an HRIA (for example as part of a larger SIA) and then having the legal team (with the inclusion of a human rights expert) assess where not merely human concerns, interest and wishes lie, but where human *rights* might be violated, in other words, assessing where the legal liabilities lie, will provide the company with a good insight of where it *has* to act out of legal obligations or considerations in order not to infringe on rights (and thus avoid legal claims), and beyond that where it *should* act out of ethical or *social responsibility* considerations. In any case, concerns for legal liability can obviously never be an excuse for not respecting human rights, on the contrary.

Recognizing the fact that legal liability can be a grey and murky field, where appearances may be deceiving, yet still constitute courses of action for victims or civil society organisations to institute claims, I would argue the following. I understand that being transparent about existing human rights issues that could be legal liability issues is not a simple thing for a company. The complexity of the facts and situations in which O&G companies often find themselves in combination with the reputation the O&G sector already has with a large section of the public and civil society, can lead to false appearances or unjustified accusations of involvement in infringements of rights, while at the same time a company might feel restricted in its possibility to react, since because of privacy or competition sensibilities reasons it cannot divulge the information that would show it non-involvement. Or, a company could be obligated (by contract) to perform certain tasks or provide/use certain services (such as security services) for/from the host country, which are subsequently abused by authorities to commit human rights violations. Yet, I would argue that taking a rights-based and legal liability focused approach might still provide a good tool for companies to identify the most

[3] UNDP Discussion Paper no. 6, Prof. Jenik Randon (international petroleum contract advisor), 'How to negotiate the "right" petroleum contract', p.6. At: http://www.un.org.kh/undp/images/stories/special-pages/extractive-industries/docs/negotiating_contracts_eng.pdf

important risk areas in which it has to act. Looking at contract clauses through a human rights legal liability lens provides a company with insights into where (further) due diligence action is triggered. Looking at human rights issues in business operations through a legal liability lens will do the same. And in case of incidents, being able to show that you did all you could to identify, prevent and mitigate or remediate, will reduce liability. It is exactly the non-transparency of companies that fuels distrust with public and civil society and will drive them to take public or legal action, because it does not trust the claims of innocence that a company is then not willing to back up with proof. Despite real risks that might exist in being transparent, it is in my opinion also simply part of a long-standing and somewhat misguided corporate culture and mentality to fear openness. Perhaps comprehensive performance of due diligence combined with transparency about its results will even reduce public and legal action to hold companies liable, and will create more trust and understanding.

Comment 3 – good practices to be built on

In my opinion, if IHRB/SHIFT (and the EU Commission) were to look for best practice examples, it would be crucially important to not only refer to corporate best practice in implementing human rights *management systems* (so not only process related examples), but importantly, refer to cases that show both a good process commitment ***and*** actual demonstrable good results. I would concur that four, five years ago, when Ruggie just introduced his framework and due diligence system, best practice examples could be limited to those involved in implementing Ruggie style management processes. However, after four, five years we should already be able to find companies whose human rights management processes have produced actual human rights result on the ground: companies that have in fact a) a sound human rights policy and management system, integrated throughout their corporate structure, b) have subsequently performed prior and continuous due diligence analyses of their operations, i.e., have performed actual HRIAs (separate or as part of/integrated in a wider SIA), and c) have accounted for their performance to stakeholders, through for example comprehensive and detailed reporting in its annual report and transparent briefings during stockholder meetings.

Some O&G companies might actually score well as an example for developing human rights management processes, but then score poorly on implementation.

(GoldCorp's Marlin Mine, not as an O&G but as an extractives company, might be named as an example of a company performing a comprehensive Human Rights Impact Assessment, but also around GoldCorp's behavior and its HRIA controversy exists)

Comment 4 – what form should the guidance take?

The guidance should at a minimum not be a restatement of the Ruggie principles adapted to O&G language. The guidance should, at the least, be a step forward towards the practical implementation of the Guiding Principles for the O&G sector. Given the seriousness of environmental and human rights issues involved in this sector, which only increases as fossil fuel becomes scarcer and as we have to look for different exploration forms (see the controversies around tar sands) and other exploration sites (see the protests against exploring in the North Pole area), the guidance needs to be daring and forward looking, motivated first and foremost by stimulating environmentally and socially sustainable and rights-respecting business operations and not by, for this very purpose, reaching a consensus result, given that looking for general consensus often leads to having to settle for lower common denominators.

Auditable standard or not?

Ruggie (GP 20 and 21) and the OECD Guidelines (Disclosure chapter) recommend company performance to be externally verified or verifiable. The GPs recommend accountability to

stakeholders. Accountability or explanation through (integrated) annual reports is becoming more common (EU Accounts Modernisation Directive, GRI reporting guidelines, etc). Externally verifiable/auditable processes are crucial therefore. This needs translation of guidelines, policies and management processes into clear, uniform KPIs. An internationally agreed uniform set of human rights KPIs also helps create a common verification standard and a level playing field. Most efficient would be if the same set of KPIs, or a similar set, could be used as guidance for the performance of HRIAs, and as 'check-boxes' to later evaluate company human rights performance, and report on it.

Creating a uniform, limited but comprehensive, set of qualitative and quantitative, process-related and outcome-related KPIs is not an easy task, and I assume not doable in the context of the current guidance. But perhaps the current guidance could recommend/require the set-up of a multi-stakeholder initiative to develop such a set of KPIs, in the lines of the initiative of FAO/ISEAL to create a sustainability guideline for the food sector with a universal set of sustainability criteria to measure socio-economic and environmental sustainability of food production.[4]

[4] For inspiration, see SAFA Guidelines:
http://www.fao.org/fileadmin/templates/nr/sustainability_pathways/docs/SAFA_Guidelines_in_a_nutshell_and_FAQ.pdf